A

NG YUET MOOI v. LEONG YEE HEIM

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
B [CIVIL APPEAL NO: W-02(A)-1024-05-2017]
25 OCTOBER 2018

FAMILY LAW: *Matrimonial property – Ancillary relief – Application for – Division of matrimonial assets – Parties agreed to defer division of assets to future*
C *date – Application by petitioner husband 18 years after decree nisi made absolute – Whether court retains jurisdiction on matters of division of assets even after decree nisi made absolute – Application to meet needs of children – Children past age of child – Whether needs of children relevant consideration – Whether delay in application accounted for – Whether husband had locus standi – Law Reform*
D *(Marriage and Divorce) Act 1976, s. 76(1)*

On 31 July 1997, the petitioner husband's ('respondent') petition for divorce was allowed and the *decree nisi* was made absolute on 22 November 1997. The court also granted two further orders, the terms of which were consensual: (i) in relation to the custody and care of the two daughters from
E the marriage; and (ii) in relation to the distribution of assets. In respect of the second order, it was agreed between the parties that the trial for the distribution of assets would be postponed to a date to be fixed. On 6 August 1997, the respondent filed a notice of intention to proceed with the application for ancillary relief ('Form 13'), supported by an affidavit
F affirmed by the respondent. An unsealed copy of the notice was served on the respondent wife ('appellant'). The relief, in substance, pertained to the distribution of two landed properties, a house in Petaling Jaya ('PJ house'), and another in Bukit Damansara ('Damansara house'). Subsequently, 18 years after the decree had been made absolute, the respondent filed a
G Form 13 notice indicating his intention to proceed with an application for ancillary relief that he had filed at the time of the petition for divorce. On 17 April 2017, the court granted the orders that: (i) the appellant be restrained from committing any further acts of breach of trust to the PJ house; (ii) the appellant to effect the transfer of the PJ house to the elder daughter within one month of the date of the Order; (iii) the Damansara
H house to be sold within six months from the date of the Order to the potential purchaser with the highest offer made within 60 days from the date of the Order and the net proceeds of sales, after deduction of all expenses of and incidental to the sale including agent fees and legal fees, shall be: (a) divided between parties proportionate to their respective contribution towards the
I property *ie*, 47% to the appellant and 53% to the respondent; and (b) any outstanding loan owed by the appellant to the Finance Ministry shall be deducted from the appellant's portion of the net proceeds of sale; and (iv) the quit rent for the Damansara house amounting to RM11,076.20 shall be borne equally by both the appellant and the respondent. The appellant appealed

against the Order. The issue for the court's consideration was whether with the consensual term to defer the division of the matrimonial assets to a date to be fixed rendered or preserved the matter of division of assets to be still available for consideration by the court under s. 76(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'), even after the decree had been made absolute.

Held (allowing appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) Any application for an order for ancillary relief, whether with leave or otherwise, must be made before the *decree nisi* is made absolute. Once the decree is made absolute, the order is final and there is no power under s. 76 of the LRA to grant any such order. However, where the court's powers on the division of assets under s. 76(1) of the LRA was invoked in the petition or response, or where it was not but leave had been sought and, in both instances, some interim direction or order on the matrimonial assets had been made at the time of grant of the *decree nisi* that the division of assets be postponed to some later date, the court retains jurisdiction under s. 76(1) to hear and make such appropriate and final order on the division of any matrimonial assets, even after the *decree nisi* has been made absolute. (paras 37 & 39)

(2) From the terms of the *decree nisi*, the parties had, by consent, agreed to defer the division of the assets to a later date and the court had ordered those terms. Consequently, the court hearing the divorce petition retained the jurisdiction on the matter of the division of assets. Although the application for ancillary relief was prayed for in the petition, and a notice of intention to proceed with the application for ancillary relief was filed post *decree nisi*, but pre-decree absolute, the application was never pursued or followed up. In fact, only an unsealed copy of the notice was served on the respondent at the material time. A sealed copy of the notice was only served about 18 years after it was first filed. Further, while the appellant did not file any affidavit-in-reply after being served, neither did the respondent do anything to ensure that a sealed copy of the notice was served or that a hearing date be fixed for the disposal of the notice, so that the appellant would have been compelled to respond, if objecting. Hence, it was too late now for the respondent to complain. (paras 41-43)

(3) While an application for division of assets may be determined after the *decree nisi* has been made absolute, all applications for such divisions must be made within a reasonable time from when the decree absolute took effect. Failure to do so within reasonable time opens such applications to challenges on grounds of delay, unwarranted delay, laches, *estoppel*, limitation by statute, or even abuse of process; all of which were raised in this appeal. An application which had not been made within reasonable time, and 18 years was certainly far from being reasonable, could not be entertained by the court as of right. Such

protracted and unaccounted for delay engendered abuse of process and must never be encouraged. Courts must always be vigilant to guard against abuse of process and its jurisdiction. (paras 44 & 45)

(4) The respondent, as the party who had been guilty of tardiness in this appeal, must, at the very least, account for his delay. He was obliged to offer sound and cogent reasons for the prolonged and inordinate delay. The failure of the trial judge to require the respondent to explain for the delay amounted to a miscarriage of justice which warranted appellate intervention. (para 46)

(5) The court's power and jurisdiction to make ancillary reliefs under s. 76(1) is premised on the divorce petition and is part of the orders granted towards achieving a clean break for the parties, that they and their offspring may make a new life. Save for the matters that the LRA specifically retains for the court to revisit in the form of, for example, variation orders on maintenance, the court granting the petition of divorce has only the jurisdiction to divide matrimonial assets. From the contents of the first affidavit, the ancillary reliefs that were sought by the respondent were, to a large part, to meet the needs of the two children, within the object of s. 76(1) of the LRA. The children were long past the age of any child from the marriage whose needs would be of any relevant consideration in an application for ancillary relief under s. 76(1). More materially, the ancillary orders prayed for were hugely different from those sought in the first affidavit. (paras 58, 60 & 61)

(6) The orders obtained by the respondent were outside the remit of s. 76(1) and if at all there was any complaint, such complaint ought to have been brought by the elder daughter, and not by the respondent. The respondent had no *locus standi* to bring the claim for the transfer, if at all, for the elder daughter. Further, any claim by the daughter could not be resolved in the court which granted the petition for divorce, invoking s. 76(1) of the LRA in support. In the circumstances, the respondent's claim for ancillary relief was no longer available for consideration by the court and the ancillary reliefs sought were outside the scope and intent of s. 76(1). (paras 63-65)

Bahasa Malaysia *Headnotes*

Pada 31 Julai 1997, petisyen pempetisyen suami ('responden') untuk perceraian dibenarkan dan *decree nisi* dijadikan mutlak pada 22 November 1997. Mahkamah juga membenarkan dua perintah lanjut, terma-termanya dipersetujui: (i) berkaitan dengan kawalan dan jagaan dua orang anak perempuan hasil perkahwinan tersebut; dan (ii) berkaitan pembahagian aset-aset. Berhubung dengan perintah kedua, dipersetujui antara pihak-pihak bahawa perbicaraan untuk pembahagian aset-aset akan ditangguhkan ke satu tarikh yang akan ditetapkan. Pada 6 Ogos 1997, responden memfailkan notis niat untuk meneruskan dengan permohonan relief sampingan ('Borang 13'), disokong dengan afidavit yang diikrarkan oleh responden. Satu salinan notis

tidak bermeterai diserahkan kepada responden isteri ('perayu'). Relief tersebut, sebenarnya, berkaitan dengan pembahagian dua hartanah, sebuah rumah di Petaling Jaya ('rumah PJ'), dan sebuah lagi di Bukit Damansara ('rumah Damansara'). Kemudian, 18 tahun selepas dekri tersebut dijadikan mutlak, responden memfailkan notis Borang 13 menyatakan niatnya untuk meneruskan dengan permohonan relief sampingan yang difailkannya pada masa petisyen perceraian. Pada 17 April 2017, mahkamah membenarkan perintah-perintah bahawa: (i) perayu dihalang daripada melakukan tindakan pecah amanah lanjut terhadap rumah PJ; (ii) perayu memindah milik rumah PJ kepada anak perempuan sulung dalam tempoh satu bulan dari tarikh Perintah; (iii) rumah Damansara dijual dalam tempoh enam bulan dari tarikh Perintah kepada pembeli berpotensi dengan harga tertinggi dibuat dalam tempoh 60 hari dari tarikh Perintah dan hasil bersih jualan, selepas menolak kesemua perbelanjaan berhubung dan berikutan jualan tersebut termasuk fi ejen dan fi guaman, akan: (a) dibahagikan antara pihak-pihak mengikut sumbangan masing-masing untuk hartanah itu, iaitu, 47% kepada perayu dan 53% kepada responden; dan (b) apa-apa pinjaman yang tertunggak oleh perayu kepada Kementerian Kewangan akan ditolak daripada bahagian perayu daripada hasil bersih jualan; dan (iv) cukai tanah untuk rumah Damansara sejumlah RM11,076.20 akan dibayar sama rata oleh perayu dan responden. Perayu merayu terhadap perintah tersebut. Isu untuk pertimbangan mahkamah adalah sama ada terma-terma persetujuan untuk menangguhkan pengagihan aset-aset perkahwinan ke tarikh yang akan ditetapkan menjadikan atau mengekalkan perkara berkaitan pengagihan aset-aset untuk pertimbangan mahkamah bawah s. 76(1) Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976, walaupun selepas dekri disahkan mutlak.

Diputuskan (membenarkan rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Apa-apa permohonan untuk perintah relief sampingan, sama ada dengan kebenaran atau sebaliknya, mesti dibuat sebelum *decree nisi* dijadikan mutlak. Sebaik sahaja *decree nisi* menjadi mutlak, Perintah tersebut muktamad dan tiada kuasa bawah s. 76 Akta untuk memberi perintah sedemikian. Walau bagaimanapun, apabila kuasa-kuasa mahkamah berkaitan pengagihan aset-aset bawah s. 76(1) Akta dibangkitkan dalam petisyen atau jawapan, atau apabila tidak dibangkitkan tetapi kebenaran telah dipohon dan, dalam kedua-dua keadaan, arahan interim atau perintah atas aset-aset perkahwinan telah dibuat semasa memberi *decree nisi* bahawa pengagihan aset-aset ditangguhkan ke satu tarikh akan datang, mahkamah mengekalkan bidang kuasa bawah s. 76(1) untuk membicarakan dan membuat perintah sewajarnya dan muktamad untuk pembahagian aset-aset perkahwinan, walaupun selepas *decree nisi* menjadi mutlak.

(2) Daripada terma-terma *decree nisi*, pihak-pihak telah, dengan persetujuan, menyetujui untuk menangguhkan pembahagian aset-aset ke satu tarikh akan datang dan mahkamah telah memerintahkan terma-terma tersebut. Dengan itu, mahkamah yang membicarakan petisyen perceraian mengekalkan bidang kuasa atas perkara pembahagian aset-aset. Walaupun permohonan untuk relief sampingan telah dipohon dalam petisyen, dan notis niat untuk meneruskan dengan permohonan untuk relief sampingan difailkan selepas *decree nisi*, tetapi sebelum dekri mutlak, permohonan tersebut tidak pernah diteruskan atau diambil tindakan susulan. Sebenarnya, hanya salinan notis tidak meterai yang diserahkan kira-kira 18 tahun selepas notis itu mula-mula difailkan. Selanjutnya, walaupun perayu tidak memfailkan apa-apa afidavit jawapan selepas diserahkan, responden juga tidak berbuat apa-apa untuk memastikan salinan meterai notis diserahkan atau tarikh perbicaraan ditetapkan untuk pemutusan notis itu, agar perayu boleh didesak untuk menjawab, jika membantah. Oleh itu, responden terlambat untuk mengadu sekarang.

(3) Sementara permohonan untuk pembahagian aset-aset boleh ditentukan selepas *decree nisi* dijadikan mutlak, kesemua permohonan untuk pembahagian sedemikian mesti dibuat dalam tempoh munasabah selepas dekri mutlak berkuat kuasa. Kegagalan berbuat demikian dalam tempoh munasabah membuka permohonan-permohonan tersebut pada cabaran atas alasan-alasan kelewatan, kelewatan tidak wajar, kelengahan, *estopel*, had masa melalui statut, malahan penyalahgunaan proses, yang kesemuanya dibangkitkan dalam rayuan ini. Satu permohonan yang tidak dibuat dalam tempoh munasabah, dan 18 tahun sememangnya jauh daripada munasabah, tidak boleh dilayan mahkamah begitu sahaja. Kelewatan yang berlanjutan dan tidak dijelaskan mengakibatkan penyalahgunaan proses dan tidak boleh digalakkan. Mahkamah mesti sentiasa berjaga-jaga untuk mengelak penyalahgunaan proses dan penyalahgunaan bidang kuasanya.

(4) Responden, sebagai pihak yang bersalah atas kelewatan dalam rayuan ini, mesti, sekurang-kurangnya memberi penjelasan untuk kelewatan tersebut. Dia bertanggungjawab menawarkan alasan-alasan munasabah dan meyakinkan untuk kelewatan yang berlanjutan dan tidak munasabah itu. Kegagalan hakim bicara meminta responden menjelaskan kelewatan itu menjurus pada salah laksana keadilan yang mewajarkan campur tangan rayuan.

(5) Kuasa dan bidang kuasa mahkamah untuk memberi relief sampingan bawah s. 76(1) adalah berasaskan petisyen perceraian dan adalah sebahagian perintah yang diberi untuk mencapai keputusan terbaik untuk pihak-pihak, agar mereka dan anak-anak mereka boleh meneruskan dengan kehidupan baharu. Kecuali berkaitan perkara-perkara yang dikekalkan Akta secara khusus untuk mahkamah menilai semula dalam bentuk, seperti, perintah variasi untuk nafkah, mahkamah yang memberi petisyen perceraian hanya mempunyai bidang kuasa

untuk membahagikan aset-aset perkahwinan. Daripada kandungan afidavit pertama, relief sementara yang dipohon oleh responden adalah, sebahagian besarnya, untuk memenuhi keperluan kedua-dua orang anak, dalam rangkuman tujuan s. 76(1) Akta. Anak-anak tersebut telah lama melangkaui umur kanak-kanak daripada perkahwinan yang keperluan mereka menjadi pertimbangan relevan dalam permohonan relief sampingan bawah s. 76(1). Lebih penting lagi, perintah-perintah sampingan yang dipohon jauh berbeza daripada yang dipohon dalam afidavit pertama.

(6) Perintah-perintah yang diperoleh responden adalah di luar bidang kuasa s. 76(1) dan jika pun ada aduan, aduan sebegitu sepatutnya dibawa oleh anak perempuan sulung, dan bukan oleh responden. Responden tiada *locus standi* untuk membawa tuntutan untuk pindah milik, jika ada, untuk anak perempuan sulung. Selanjutnya, apa-apa tuntutan oleh anak perempuan itu tidak boleh diputuskan di mahkamah yang memberikan petisyen untuk perceraian, dengan membangkitkan s. 76(1) Akta sebagai sokongan. Dalam hal keadaan tersebut, tuntutan responden untuk relief sampingan tidak boleh dikekalkan untuk dipertimbangkan mahkamah dan relief sampingan yang dipohon adalah di luar skop dan niat s. 76(1).

Case(s) referred to:
Chew Ling Hang v. Aw Ngiong Hwa [1997] 4 CLJ 448 CA ***(refd)***
Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(refd)***
Tan Pau Soon v. Lim Beng Choo [1997] 2 SLR 372 ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 56(1), (2), 61
Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (3), 77(1)(b)
Limitation Act 1953, ss. 6(3), 32

For the appellant - In person
For the respondent - Foo Yet Ngo & Kiran Dhaliwal; M/s Y N Foo & Partners
Amicus curiae - Kan Weng Hin & Jillian Yuen Jie Ying

[Editor's note: Appeal from High Court, Kuala Lumpur; Divorce Petition No: S3-33-853-1996 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim JCA:

[1] Eighteen years after the divorce decree had been made absolute, the respondent filed a Form 13 notice indicating his intention to proceed with an application for ancillary relief that he had filed at the time of the petition for divorce. The application was with regards to the division of two landed properties between the parties. By virtue of a consent order entered at the time of the divorce, the parties had agreed to defer this application "at a later date".

[2] After hearing the parties, the order was granted. The appellant wife appealed.

[3] As the appellant was unrepresented and the appeal concerned an interpretation and construction of law, in particular s. 76(1) of the Law Reform (Marriage and Divorce) Act 1976, which issue, we believe, will impact and bear important ramifications outside the immediate parties before us, we unanimously decided to seek the assistance of an *amicus curiae*. To her credit, learned counsel for the respondent agreed to coordinate and obtain the assistance of the sub-committee for family matters set up under the auspices of the Bar Council.

[4] At the hearing of this appeal, Mr WH Kan appeared as an *amicus curiae*. He also filed and served written submissions. The court records its appreciation to Mr Kan for his most helpful assistance which has been rendered impartially and professionally.

[5] After hearing extensive oral submissions from all parties, we reserved our decision. This is our decision having carefully considered the records of appeal, the law and the submissions.

Brief Facts

[6] On 31 July 1997, the respondent husband's petition for divorce was allowed. Then Judicial Commissioner Zainun Ali granted a *decree nisi* to be made absolute within three months from the date of the order. On that same date, the court granted two further orders the terms of which were consensual; the first in relation to the custody and care of the two daughters from the marriage; the second in relation to the distribution of assets. In respect of the second order, it was agreed between the parties that the trial for the distribution of assets would be postponed to a date to be fixed (Bahawa perbicaraan bagi pembahagian aset-aset suami isteri ditunda ke suatu tarikh yang akan ditetapkan kelak) – see pp. 252 and 253 of the records of appeal. For convenience, we will adopt the appellant's description of this second order as the "deferral clause".

[7] A week later, on 6 August 1997, the respondent filed a notice of intention to proceed with the application for ancillary relief (Form 13), which relief was sought in the original petition for divorce. That notice was supported by an affidavit affirmed by the respondent on 6 August 1997. An unsealed copy of the notice was served on the appellant. The relief, in substance, pertains to the distribution of two landed properties, a house at No. 9 Jalan SS21/54, Damansara Utama, 47400, Petaling Jaya ("the PJ house"), and another at No. 76 Jalan Setiabakti 9, Bukit Damansara, 50490, Kuala Lumpur ("the Damansara house").

[8] On 22 November 1997, the *decree nisi* was made absolute – see p. 255 of the records of appeal.

[9] On 27 November 2015, the respondent filed a supplementary affidavit which was affirmed on 26 November 2015. The notice of intention to proceed (Form 13) was fixed for hearing on 15 December 2015 before a Senior Assistant Registrar. There then followed an exchange of affidavits

after the appellant filed her affidavit on 10 May 2015. The respondent filed two affidavits-in-reply (21 July 2017 and 25 October 2017) while the appellant filed another on 28 September 2017. In addition is an affidavit affirmed by Sharon Tee Kwee Ying, an advocate and solicitor with the respondent's solicitors in which a trust deed dated 15 October 1986 was exhibited.

[10] On 17 April 2017, the learned judge granted the following orders:

1. the Respondent Wife be restrained from committing any further acts of breach of trust to the property at No. 9 Jalan SS21/54, Damansara Utama, 47400, Petaling Jaya ("the PJ House").
2. The Respondent Wife do effect the transfer of the PJ House to the elder daughter, Leong Miu Yoong within one month of the date of the Order herein.
3. The property at No. 76 Jalan Setiabakti 9, Bukit Damansara, 50490, Kuala Lumpur ("the Damansara House") be sold within six (6) months from the date of the Order to the potential purchaser with the highest offer made within sixty (60) days from the date of the Order herein and the net proceeds of sales after deduction of all expenses of and incidental to the sale including agent fees and legal fees shall be:
    a. Divided between parties proportionate to their respective contribution towards the property ie, 47% to the Respondent and 53% to the Petitioner Husband.
    b. Any outstanding loan owed by the Respondent Wife to the Finance Ministry shall be deducted from the Respondent Wife's portion of the net proceeds of sale.
4. The quit rent for the Damansara House amounting to RM11,076.20 shall be borne equally by both the Respondent Wife and the Petitioner Husband.

Submissions

[11] The appellant herself filed extensive written submissions; the principal arguments are summarised as follows.

[12] First, is the complaint on the jurisdiction of the court, that the court has no jurisdiction to grant the orders sought by the respondent under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (LRA), any order on the distribution of matrimonial assets must be made when granting the decree of divorce, and not after. The orders appealed against were made 18 years after the decree was made absolute.

[13] Even if the court had the necessary jurisdiction, the appellant submitted that the learned judge had failed to take into account the existence of a supplement to the declaration of trust deed. The supplement was made on 9 June 1994 whereas the declaration is dated 15 October 1986. This supplement, registered at the land office, is said to have been acknowledged by the respondent.

[14] It was the further submission of the appellant that the respondent has no *locus standi* to apply for the transfer of the property, that is, the PJ house, to the elder daughter. If at all there is any claim under the trust deed, such claim should be made by the elder daughter herself, who has more than "attained the age of majority". In any case, the application for the orders sought ought to have been made under the National Land Code and not, under the Law Reform (Marriage and Divorce) Act 1976. In addition, the claim was in relation to a trust; and such a claim is said to be outside the jurisdiction of the family court or the court hearing the petition for divorce.

[15] The appellant further submitted that the respondent had slept on his rights, applying for the ancillary reliefs 18 years too late. He should, therefore, account for his delay.

[16] Finally, the appellant submitted the application was time-barred under s. 6(3) of the Limitation Act 1953 as it was brought more than 12 years from the date on which the judgment became enforceable.

[17] It was the submission of learned counsel for the respondent that the parties had agreed to defer the division of assets to a date in the future. The respondent's notice of application to proceed with ancillary relief was properly filed pursuant to r. 61 of the Divorce and Matrimonial Proceedings Rules 1980. Rule 61 requires the issue of division of matrimonial assets to be set down for determination three months before the *decree nisi* is made absolute.

[18] The respondent further argued that s. 6(3) of the Limitation Act has no application because the *decree nisi* is not a judgment but an order of the court. There was also no pronouncement on the merits in the *decree nisi.*

[19] On the issue of laches, the respondent submitted that the doctrine had no application because no equitable relief was being pursued – see s. 32 of the Limitation Act. Even if the doctrine applied, the appellant had failed to show how she is prejudiced by the delay. The respondent further urged this court to apply a liberal interpretation when dealing with the LRA since it is a piece of social legislation. Given that the appellant does not dispute the existence of the trust in favour of the elder daughter, such liberal interpretation should be invoked.

[20] The *amicus curiae* submitted that although it was only an unsealed copy of the notice of application of intention to proceed with ancillary relief that was served on the appellant at the material time, and that until and unless a sealed copy was served, there was no valid notice. Be that as it may, on the basis of the deferral clause, the application was filed in time under s. 76 of the LRA, even if it was filed after the decree absolute that been issued.

[21] Like the respondent, the *amicus curiae* did not perceive the proceedings time-barred, but on slightly different ground. Learned counsel was of the view that the filing of the Form 13 notice is not an "action upon any judgment"; it was a continuation of or the "next step" in the proceedings before the matrimonial court.

[22] In respect of the order regarding the PJ house, learned counsel submitted that only a beneficiary can institute proceedings to enforce the terms of the trust, assuming there was a trust and not an oral domestic arrangement between the parties concerning the establishment of a trust deed for the PJ house. Consequently, learned counsel agreed with the appellant that the respondent lacked *locus standi* to bring the action to enforce the terms of the trust.

[23] Further, the order made in respect of the PJ house is in the nature of an order for specific performance compelling the appellant to give effect to the oral agreement between the parties as contained in the trust deed. In other words, it was an order enforcing the trust. Not only is that for the beneficiary, the elder daughter to take the proper recourse, the court hearing the divorce petition under LRA is not the appropriate forum to determine and make such orders. At the hearing of divorce petitions, the court is only dealing with the division of the assets which the divorcing parties had acquired during the marriage.

[24] Finally, on the issue of inordinate delay, it was urged upon us to take into consideration prejudicial factors, change of circumstances and whether any party was seeking an advantage by delaying the application for ancillary relief.

Our Deliberations And Determination

[25] This appeal turns on the interpretation and construction of s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (LRA) which reads as follows:

> **Power for court to order division of matrimonial assets**
>
> 76. (1)The court shall have power, **when granting** a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets:
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division.
>
> (3) The court shall have power, **when** granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

A (4) In exercising the power conferred by subsection (3) the court shall have regard to:

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

B (b) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

C (5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts. (emphasis added)

[26] Section 76 of the LRA came under consideration by the Federal Court D in *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; [2009] 1 MLJ 21.

[27] In *Manokaram*, no application for ancillary relief was sought in the petition, neither was there an application for leave under r. 56(2). The appellant's notice of application for ancillary reliefs was filed before the E *decree nisi* was made absolute. However, the notice was struck out for non-attendance. No application for reinstatement was made. Instead a fresh notice of application for ancillary relief was filed. This second notice was struck out on the ground that no leave had been sought. A third notice was then filed. In this third notice, leave was sought.

F **[28]** At the same time, the respondent filed an application to set aside the decree absolute. The application was dismissed and the decision was upheld by the Court of Appeal. The motion for leave to appeal to the Federal Court was also dismissed.

G **[29]** Meanwhile, the third notice was heard and allowed by the High Court notwithstanding that the *decree nisi* had been made absolute. The appeal was dismissed by the Court of Appeal. According to the Federal Court, the single question for determination was:

H Can leave of the Court be granted to a party in a petition to proceed with a claim for property division under s. 76 and/or under any provision of the Law Reform (Marriage and Divorce) Act 1976 after *decree nisi* has been made absolute.

[30] The High Court was of the view that it had jurisdiction and/or power to entertain the application and proceeded to grant the application. The Court I of Appeal dismissed the appeal. The Federal Court answered the question in the negative, allowed the appeal and set aside the order of the High Court. The reasoning of the Federal Court is relevant for the purpose of this appeal.

[31] Zaki Azmi (then PCA) was of the view that "an order for division of matrimonial asset is limited to the time when granting a decree for divorce or judicial separation and not at a later stage. I am very sure that this is the interpretation that is to be given to s. 76. Even Singapore had to amend their Women's Charter to enable that ancillary reliefs could be made at any time subsequent to the grant of a judgment of divorce".

[32] It was not in dispute that the third notice was filed after the decree had been made absolute. The Federal Court was unequivocal in its conclusions that the power of the court to order division of matrimonial assets under s. 76 requires any application for such order to be made either in the petition or answer itself in which case it would be dealt with by the court when ordering the decree of dissolution of marriage. The only latitude given by s. 76, without violating the clear and express terms of s. 76 is where there was no application for such order of division either in the petition or answer to the petition, but before the decree is made absolute, an application for such order is made and even then, it is with leave of the court. Such a situation is envisaged under r. 56(2) of the Divorce and Matrimonial Proceedings Rules 1980 (the Rules).

[33] Given that the third notice was filed after the *decree nisi* had already been made absolute, the court had no jurisdiction to allow the application.

[34] At para. [23] of the judgment, Arifin Zakaria FCJ expressed the view that the power of the court to order division of matrimonial assets is governed by s. 76. In both instances of assets acquired under sub-ss. 76(1) and (3), "the court shall have power to make such order 'when granting a decree of divorce', that is, on the date when the *decree nisi* is made absolute." Later, at para. [26], His Lordship contrasted the terms of s. 76 with s. 77(1)(b) and made the following observation:

> It is relevant to note that under s. 77(1)(b) of the Act it is expressly stated that the Court may order payment of maintenance when granting or subsequent to the grant of a decree of divorce or judicial separation. Therefore, it is clear that the order for maintenance can be made even after the *decree nisi* has been made absolute. This is not so in the case of division of matrimonial assets. In s. 76 it is clearly provided that the power of the Court to make an order for the division of matrimonial assets **can only be exercised when granting decree of divorce and at no later stage.** (emphasis added)

[35] The Federal Court rejected in that appeal, the respondent's claim that there was a pending application for division when the *decree nisi* was made absolute on the basis that that application had been dismissed for want of leave. It was undisputable that the third application which formed the substratum of the appeal was filed subsequent to the decree absolute. At para. [40], the Federal Court pronounced unequivocally:

A [40] Reverting to the issue before us, I am of the view that under s. 76(1) and (3) of the Act, the Court's jurisdiction to order division of matrimonial assets is limited to the time when granting a decree of divorce or judicial separation and not at a later stage. As the present application was made subsequent to the decree absolute, therefore, I hold that the Court has no jurisdiction to grant such order.

B

[36] The court found its reading of s. 76 consistent with the "clean break" principle; and support for this conclusion from an earlier decision of the Court of Appeal in *Chew Ling Hang v. Aw Ngiong Hwa* [1997] 4 CLJ 448; [1997] 3 MLJ 107 which had taken what the Federal Court saw as a "justified" "narrow interpretation of the word 'subsequently' in r. 56(1)" in
C the face of s. 76(1) and (3) of the Act; and a decision from Singapore Court of Appeal in *Tan Pau Soon v. Lim Beng Choo* [1997] 2 SLR 372. The Federal Court was of the further view that s. 76 had to be amended to insert the words "or subsequent to the grant; or words to like effect in order to clothe the court with necessary jurisdiction to make such order subsequent to the granting of
D the decree absolute."

[37] It is, therefore, abundantly clear from *Manokaram* that any application for an order for ancillary relief, whether with leave or otherwise, must be made before the *decree nisi* is made absolute. Once the decree is made absolute, the order is final and there is no power under s. 76 to grant any
E such order.

[38] In the present appeal, the application for ancillary relief was sought in the petition. We take this to be uncontested although the petition for divorce is not to be found in the records of appeal. The issue now before us is whether
F with the consensual term to defer the division of the matrimonial assets to a date to be fixed renders or preserves the matter of division of assets to be still available for consideration by the court under s. 76(1), even after the decree has been made absolute.

[39] In our view, it will depend on several factors. Where the court's
G powers on the division of assets under s. 76(1) was invoked in the petition or response, or where it was not but leave had been sought and, in both instances, some interim direction or order on the matrimonial assets had been made at the time of grant of the *decree nisi* that the division of assets be postponed to some later date, the court retains jurisdiction under s. 76(1) to
H hear and make such appropriate and final order on the division of any matrimonial assets, even after the *decree nisi* has been made absolute. This reasoning may be found in *Manokaram* where the Federal Court agreed with the approach taken by the Singapore Court of Appeal in *Tan Pau Soon*.

[40] This view is shared by Mahadev Shanker JCA in *Chew Ling Hang*
I *v. Aw Ngiong Hwa* where at p. 455 (CLJ); p. 113 (MLJ), His Lordship said:

> Occasions may arise where the legal advisers or even the Court may think it tactically advisable to grant the decree first because, *inter alia*, it may simplify the resolution of the collateral issues. The residuary powers of the Court to extend or abridge time is always there, but the words are clear and any order for ancillary relief must relate back to the granting of the decree because it is upon the decree that the ancillary relief is hinged.

[41] From the terms of the *decree nisi*, the parties had, by consent agreed to defer the division of the assets to a later date and the court had ordered those terms. Consequently, the court hearing the divorce petition retained jurisdiction on the matter of the division of assets.

[42] In the instant appeal, although the application for ancillary relief was prayed for in the petition, and a notice of intention to proceed with the application for ancillary relief was filed (6 August 1997) post-*decree nisi* (31 July 1997) but pre decree absolute, the application was never pursued or followed up. In fact, only an unsealed copy of the notice was served on the respondent at the material time. A sealed copy of the notice was only served on 15 December 2015, about 18 years after it was first filed.

[43] Although there are arguments from both sides on the filing of an affidavit-in-reply by the appellant, the appellant contending that she was not required to file any affidavit until a sealed copy of the notice was served, and the respondent contending otherwise, we do not see it necessary for us to rule on this as no protest or objection was raised at the material time. While the appellant did not file any affidavit-in-reply after being served, neither did the respondent do anything to ensure that a sealed copy of the notice is served or that a hearing date be fixed for the disposal of the notice, so that the appellant would have been compelled to respond, if objecting. It is now too late for the respondent to complain.

[44] Even though the court retains jurisdiction, we do not agree that the respondent, or any party for that matter, can expect to take off from where the matter of the application for ancillary relief was last left off, with nary a concern, as if it is of right. By no means can any consensual agreement to defer the division of assets to a later date mean that it is open to the parties involved to approach the court, as and when they please. While an application for division of assets may, in the proper circumstances alluded to earlier, be determined after the *decree nisi* has been made absolute, all applications for such divisions must be made within a reasonable time from when the decree absolute took effect. Failure to do so within reasonable time opens such applications to challenges on grounds of delay, unwarranted delay, laches, estoppel, limitation by statute, or even abuse of process; all of which are raised in this appeal.

[45] We are of the firm view that an application which has not been made within reasonable time, and 18 years is certainly far from being reasonable, cannot be entertained by the court as of right. Such protracted and unaccounted for delay engenders abuse of process and must never be encouraged. Courts must always be vigilant to guard against abuse of process and its jurisdiction.

[46] We are equally firm in our view that the party who has been guilty of tardiness and that would be the respondent in this appeal, must, at the very least, account for his delay. He is obliged to offer sound and cogent reasons for the prolonged and inordinate delay. The failure to offer any reasonable explanation is reason enough to refuse the application. When the respondent's application and affidavits are examined, it will become readily apparent that the learned judge ought to have asked for some reasonable explanation before proceeding to hear the application. The failure of the learned judge to require the respondent to explain for the delay amounts to a miscarriage of justice which warrants appellate intervention.

[47] In the first place, the notice of application to proceed for ancillary relief is premised and reliant on an affidavit that the respondent affirmed almost 20 years earlier. By the time the learned judge granted the order which is the subject of this appeal, on 17 April 2017, the affidavit affirmed on 6 August 1997 was almost 20 years old. No doubt the respondent had on filed a supplementary affidavit which was affirmed on but this does not alter the fact that the notice was dependent on that primary affidavit.

[48] Now, what is expressed in that affidavit firmly and clearly illustrates why any application for division of assets must be made before the *decree nisi* is made absolute, or soon after. These are the material parts of the respondent's affidavit affirmed on 6 August 1997, shortly after the *decree nisi* was granted on 31 July 1997.

[49] The respondent first identifies the existence of two assets acquired during the marriage, the PJ house and the Damansara house. At paras. 6 and 7, the respondent details the marriage, its breakdown and the unsuccessful reconciliation. At paras. 8 to 10, the respondent explained about his current employment, income, expenditure and liabilities, and that he was "already spending beyond my means, without taking into consideration necessities like toiletries and maintenance of the house in PJ."

[50] The respondent then went on to explain his belief that the appellant had emigrated to New Zealand together with the younger daughter, that the appellant had sold various matrimonial assets to finance that emigration. At para. 12, the respondent deals with the matter of custody and responsibility of the two daughters:

> 12. Both the respondent and I each have had a daughter in our respective custody for whom we each agreed to be financially responsible.

[51] The respondent next explained how the elder daughter "is an exceptional student who has done well in her studies", as a result of which "she was short-listed to receive the JPA scholarship to do her university degree in UK and to follow the A'level examinations set by Oxford." From paras. 13.3 to 13.6, the respondent explained how the appellant had suggested emigrating to New Zealand and then not going ahead with the suggestion, how that suggestion and change of plans had affected the elder daughter's education, how he had to raise funds in order that the elder daughter could pursue her degree and postgraduate studies and how much more the elder daughter would require "for the next four years". All this culminated with the respondent stating at para. 14 that:

> 14. I am not able from my income alone to make financial provisions for the whole family.

[52] At para. 15, the respondent then made the following proposal:

> 15. In order to provide for the needs of the whole family, including the children of the marriage who are in need of finances for their respective education, I would suggest the following for a global settlement of all the claims of the respondent and I:
>
> 15.1 The house in PJ is already the subject of trust in favour of Miu Yoong by mutual agreement between the respondent and I. This trust is already registered at the Land Office and the trust documents are in the possession of the respondent.
>
> 15.2 The house in Damansara which is in joint names, is vacant. I believe that if this property is sold, the proceeds of the sale can be used to finance the requirements of the family and more especially the needs of the children of this marriage.
>
> 15.3 Therefore, I suggest that the Damansara house be sold and the proceeds of the sale be divided in the following manner:
>
> (a) a sum proportional to the value of the PJ House be set up in trust for Roslyn;
>
> (b) the balance of the proceeds to be divided between the respondent and I in a manner that this Honourable Court deems just and equitable.

[53] In the supplementary affidavit filed on 27 November 2015, the respondent made the following averments at para. 7 about what had occurred since the filing for ancillary relief. In particular, the respondent averred that the appellant had "failed, refused and/or neglected" to transfer the PJ house to the elder daughter despite him transferring his share to the appellant's sole name and for the appellant to hold the PJ house on trust for the elder daughter. This arrangement made on 15 October 1986 was alleged to have been breached by the appellant.

[54] At para. 7.2, the respondent averred that he found out in 2014 that the appellant had, in 1994, without his knowledge and consent and contrary to the terms of the trust deed, mortgaged the PJ house for a loan of RM130,000 for the appellant's use. The respondent further averred that the appellant had failed to settle her outstanding loan which was taken from the Government, leaving the house in jeopardy of being auctioned.

[55] At para. 7.4, the respondent alleged that the appellant was in breach of trust when she withdrew a sum of RM12,000 from an account which the appellant jointly held with the elder daughter.

[56] At para. 8, the respondent acknowledged:

> 8. For the past 18 years, all the circumstances have changed drastically between the respondent and I, as well as our daughters.

[57] The respondent alluded to what the younger daughter, now aged 30 was doing before seeking at para. 9, the following orders:

> 9.1 That the respondent be restrained from committing any further acts of breach of trust in relation to the property at No ... ("the PJ House")
>
> 9.2 That the respondent do effect the transfer of the PJ House to ... within fourteen (14) days of the date of the Order herein.
>
> 9.3 That the property at ... ("the Damansara House") be sold within six (6) months from the date of the Order to the potential purchaser with the highest offer and the net proceeds of sales after deduction of all expenses of and incidental to the sale including agent fees and legal fees shall be divided between the respondent and I proportionate to our respective contribution towards the property ie, 47% to the respondent and 53% to me any outstanding loan owed by the respondent to the Finance Ministry shall be deducted from the respondent's portion of the net proceed of sale.

[58] As opined in *Chew Ling Hang v. Aw Ngiong Hwa (supra)*, the order for ancillary relief "must relate back to the granting of the decree because it is upon the decree that the ancillary relief is hinged." The matters set out at para. 7 of the first affidavit are arguably matters that relate back to the petition for a divorce decree; but the matters set out in para. 9 of the supplementary affidavit are far from being so related. Paragraph 9 relates new events, quite unconnected with the divorce. The court's power and jurisdiction to make ancillary reliefs under s. 76(1) is premised on the divorce petition and is part of the orders granted towards achieving a clean break for the parties, that they and their offspring, may each make a new life. Save for the matters that the Act specifically retains for the court to revisit in the form of for example, variation orders on maintenance, the court granting the petition for divorce has only jurisdiction to divide matrimonial assets. It certainly, does not have jurisdiction to deal with breach of trust or complaints of the nature that we see in the supplementary affidavit.

[59] Aside from a change in the basis or reasons relied on when approaching the court for ancillary reliefs under s. 76(1), it is immediately apparent that even the ancillary reliefs sought at para. 9 of the supplementary affidavit are quite different from those proposed at para. 15.3 in the first affidavit filed in support of the notice of intention to proceed for ancillary relief.

[60] From the contents of the first affidavit, the ancillary reliefs that were sought by the respondent were to a large part, to meet the needs of the two children. This, arguably would be within the object of s. 76(1). At the time of the *decree nisi*, the girls were aged 21 and 10 respectively. Both daughters are now aged 41 and 30 respectively though they were two years younger at the time of the respondent's filing of his supplementary affidavit. In either case, these children are long past the age of any child from the marriage whose needs would be of any relevant consideration in an application for ancillary relief under s. 76(1).

[61] More materially, the ancillary orders prayed for at para. 9 in the supplementary affidavit and which were ultimately ordered by the learned judge are hugely different from those sought at para. 15.3(a) and (b) of the first affidavit. Certainly, there was no restraining order applied for in the first affidavit nor an order that the appellant transfer the PJ house to Miu Yoong. In the first affidavit, the respondent was seeking to sell the Damansara house and dividing up the proceeds of sale in the manner set out at para. 15.3(a) and (b). At para. 9.3 of the supplementary affidavit, the proposal of sale and the use or allocation of the proceeds of sale are quite different from those proposed at para. 15.3(a) and (b) of the first affidavit.

[62] Even if for a moment the application was still available for consideration by the learned judge, we say that the reliefs sought were nevertheless beyond the scope of s. 76(1). The respondent had claimed that the PJ house was actually the subject of a trust and that the trust deed was registered at the land office. However, the respondent asked for and was granted an order directing that the appellant be restrained from committing any further acts of breach of trust in relation to the PJ house; and that the appellant do transfer the PJ house to Miu Yoong within 14 days from the date of the order.

[63] We agree with the submissions of the appellant and learned *amicus curiae* that these orders were clearly outside the remit of s. 76(1). We further agree with them that if, at all, there was any complaint, such complaint ought to have been brought by the elder daughter, and not by the respondent. The respondent has no *locus standi* to bring the claim for the transfer, if at all, for the elder daughter.

A **[64]** Further, any claim by that daughter cannot be resolved in the court which granted the petition for divorce, invoking s. 76(1) in support. Any claim by this daughter must necessarily invoke some other appropriate jurisdiction which does not include family and matrimonial powers under the Law Reform (Marriage & Divorce) Act.

B **[65]** None of the above issues was addressed by the learned judge. It was incumbent on the learned judge to do so, to seek an explanation on how such shift and change of reasons for and the change in the proposal on the appropriate ancillary reliefs can still properly find repose in s. 76(1). Had the learned judge addressed these real and valid concerns, it would have become
C readily apparent that the respondent's application for ancillary relief was no longer available for consideration by the court, that the ancillary reliefs sought were outside the scope and intent of s. 76(1).

[66] For all these reasons, the appeal must be allowed.

D

E

F

G

H

I